

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STEPHEN A. KELLOGG,)	
)	
Petitioner,)	Case No. 05-0955-MJP-JPD
)	
v.)	
)	
DR. ANDREW PHILLIPS,)	REPORT AND RECOMMENDATION
)	
Respondent.)	

I. INTRODUCTION AND SUMMARY CONCLUSION

Petitioner has filed a 28 U.S.C. § 2254 petition for writ of habeas corpus. Respondent has filed a response opposing the petition. Following a careful review of the record, the Court recommends that petitioner's § 2254 petition be denied because it is barred by the statute of limitations.

II. FACTS AND PROCEDURAL HISTORY

Petitioner was charged in Snohomish County Superior Court with the first degree murder of his father.¹ Dkt. No. 12, Exs. 1, 2. Petitioner admitted to the killing, but pleaded not guilty by reason of insanity. Dkt. No. 12, Ex. 2. On July 23, 1990, the Superior Court

¹There is some inconsistency in the record with respect to the specific crime with which petitioner was charged. The order from the Court of Appeals dismissing his personal-restraint petition states that the petitioner was charged with second-degree murder. Ex. 6. However, the § 2254 petition, order of commitment, and petitioner's reply indicate that he was charged with first-degree murder. Dkt. No. 12, Ex. 1; Dkt. Nos. 1, 14.

01 entered an order finding petitioner competent to enter his plea, but determined that he was
02 insane at the time of the crime and thus found him not guilty by reason of insanity. Dkt. No.
03 12, Ex. 1. The court further found that petitioner was a “substantial danger” to public safety
04 and committed him to treatment at Western State Hospital, where he remains today. *Id.*

05 On June 17, 2004, petitioner filed a Personal Restraint Petition (“PRP”) with Division
06 One of the Washington Court of Appeals. Dkt. No. 12, Ex. 4. The PRP was dismissed as
07 time-barred because it was filed long after the one-year statute of limitations had expired.
08 Dkt. No. 12, Ex. 6. A certificate of finality was issued on December 6, 2004. Dkt. No. 12,
09 Ex. 7.

10 On November 10, 2004, petitioner filed a second PRP with the Court of Appeals.
11 Dkt. No. 12, Ex. 8. On December 8, 2004, the court found that the second petition raised
12 issues similar to the first and therefore dismissed it as successive. Dkt. No. 12, Ex. 9.

13 On January 13, 2005, petitioner filed a Motion for Discretionary Review of his second
14 PRP with the Washington Supreme Court. Dkt. No. 12, Exs. 10, 11. He argued, among
15 other things, that he was not knowingly informed of his right to appeal and that his right to a
16 fair trial was violated by a variety of alleged conspiracies between the Snohomish County
17 defender, prosecutor, police, and Superior Court. Dkt. No. 12, Ex. 10. The court determined
18 that the motion was untimely, but notified petitioner by letter dated January 14, 2005, that he
19 could file a motion for extension of time, and that such motion needed to be filed no later
20 than February 11, 2005. Dkt. No. 12, Ex. 11. The Supreme Court received a letter from
21 petitioner on January 25, 2005, which indicated he would “try again.” Dkt. No. 12, Ex. 12.
22 However, petitioner failed to file a motion for extension of time and the Supreme Court
23 dismissed the motion for discretionary review of the PRP as abandoned on February 16,
24 2005. Dkt. No. 12, Ex. 13. A certificate of finality was issued on May 17, 2005. Dkt. No.
25 12, Ex. 14.

26 On February 9, 2005, petitioner filed a third PRP with the Court of Appeals, which

the court dismissed as time-barred, successive, and meritless. Dkt. No. 12, Exs. 15, 16. Petitioner moved for discretionary review of the third dismissal with the Washington Supreme Court. Dkt. No. 12, Ex. 17. The court agreed with the Court of Appeals and denied the PRP. Dkt. No. 12, Ex. 18. A certificate of finality was issued on June 21, 2005. Dkt. No. 12, Ex. 19.

On May 24, 2005, petitioner filed a 28 U.S.C. § 2254 petition for writ of habeas corpus in this Court. Dkt. No. 1. His amended petition is now before the Court. Dkt. No. 4.

III. CLAIMS FOR RELIEF

Petitioner's amended habeas petition raises three grounds for relief. He argues that (1) he was not competent at his sentencing hearing; (2) he was not notified of his right to appeal; and (3) the Washington Supreme Court denied his motion for discretionary review in violation of state law. Dkt. No. 4. In its answer, respondent argues that the petition is time-barred.² Dkt. No. 10.

IV. DISCUSSION

A. AEDPA's Statute of Limitations Bars Petitioner's Claims.

AEDPA provides for a one-year statute of limitations for § 2254 petitions challenging state-court convictions. *See* 28 U.S.C. § 2244(d)(1) (1996). The statute of limitations applies to petitioners whose state-court judgments became final prior to the date AEDPA was signed into law – April 24, 1996 – but grants them a one year grace period in which to file. *See Carey v. Saffold*, 536 U.S. 214, 217 (2002); *Patterson v. Stewart*, 251 F.3d 1243, 1245 (9th Cir. 2001). Thus, for petitioners whose judgments became final prior to April 24, 1996, the period to file expired on April 24, 1997. *Patterson*, 251 F.3d at 1245.

²Respondent also argues that petitioner has failed to exhaust his claims in state court and that petitioner is not entitled to an evidentiary hearing. Dkt. No. 12, Ex. 10. This Report and Recommendation does not address either argument because, as discussed below, the petition is time-barred. Additionally, petitioner did not request — and the facts do not require — that an evidentiary hearing be held.

01 In this case, the Superior Court's order of commitment became final thirty days after
02 it was issued, on or about August 30, 1990. Wash. R. App. P. 2.2(a)(8), 5.2. Hence,
03 petitioner had until April 24, 1997, to file a timely § 2254 petition. *Patterson*, 251 F.3d at
04 1245. The petition, however, was not filed until May 24, 2005, more than eight years after the
05 statute of limitations expired. Dkt. No. 1. The petition is therefore time-barred unless
06 petitioner can show he is eligible for statutory or equitable tolling.

07 B. AEDPA's Tolling Provisions Do Not Save Petitioner's Claims From Being
08 Time-Barred.

09 AEDPA contains a provision that tolls the statute when a state collateral attack is
10 properly filed. Additionally, AEDPA's statute of limitations is subject to equitable tolling
11 under limited circumstances. Neither of these provisions, however, saves this petition from
12 being time-barred.

13 1. Statutory Tolling.

14 The AEDPA's statute of limitations may be tolled for "[t]he time during which a
15 properly filed application for State post-conviction or other collateral review with respect to
16 the pertinent judgment or claim is pending[.]" 28 U.S.C. § 2244(d)(2). Thus, a PRP that is
17 properly filed prior to the running of the statute tolls it. A PRP is properly filed when it is
18 accepted by the court as complying with the applicable state rules governing such filings,
19 including proper form and fee, and within the prescribed time limits. *Artuz v. Bennett*, 531
20 U.S. 4, 8-9 (2002). In this case, however, petitioner filed his first PRP on June 17, 2003, more
21 than seven years after the AEDPA statute of limitations had expired. Dkt. No. 12, Exs. 18, 27.
22 As a result, AEDPA's statutory tolling provisions do not save this petition.

23 2. Equitable Tolling.

24 AEDPA's statute of limitations may also subject to equitable tolling. *Pace v.*
25 *DiGuglielmo*, 125 S. Ct. 1807, 1814-15 & n.8 (2005). The Supreme Court, however, has
26 indicated that equitable tolling is applicable only in very limited circumstances. To succeed
on an equitable-tolling argument, the petitioner must show (1) that he has been pursuing his

rights diligently; and (2) that some extraordinary circumstances stood in his way. *Id.* at 1814; accord *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999) (internal citations omitted).

Mental incompetence can satisfy the high standard necessary to permit equitable tolling. *Calderon v. U.S. Dist. Ct. for C. D. of California (Kelly)*, 163 F.3d 530, 541-42 (9th Cir. 1998) (en banc), *abrogated in part on other grounds by Woodford v. Garceau*, 538 U.S. 202, 209-10 (2003). In order to do so, however, petitioner must show that his “mental incompetence in fact caused him to fail to meet the AEDPA filing deadline[.]” *Laws v. Lamarque*, 351 F.3d 919, 923 (9th Cir. 2003). This inquiry must focus on the period in which the equitable tolling would have applied. *Id.* at 923-24. When a petitioner asserts in a verified petition that he is entitled to equitable tolling based on mental incompetence and the record lacks evidence to the contrary, the court must order factual development. *Id.* at 924.

For equitable tolling to apply in this case, petitioner must have been mentally incompetent prior to the expiration of the statute of limitations on April 24, 1997. Petitioner asserted that “[m]ental illness has prevented [him] from timely filing.” Dkt. No. 14. He has also submitted treatment notes from 2004 and 2005 which indicate that he suffers from a schizoaffective disorder, has delusional thought processes, and is a danger to others. *Id.* As a result of these allegations, the Court ordered respondent to supplement the record with medical records relating to petitioner’s competency during the period in question. Dkt. No. 15.

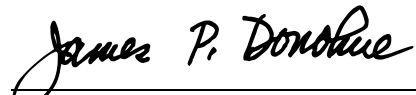
Having carefully reviewed the record, including the supplemental medical records submitted by respondent, the Court concludes that the petition cannot be saved by equitable tolling. The trial court found that petitioner was competent. Specifically, it found he was “capable of appreciating his peril[.]” that he had a “rational as well as factual understanding of the proceedings against him[.]” and that he was competent to enter his plea. Dkt. No. 12, Ex. 1. These findings are presumed to be accurate, absent clear and convincing evidence to the contrary. 28 U.S.C. § 2254(e)(1); *Arnold v. Runnels*, 421 F.3d 859, 862 (9th Cir. 2005).

01 Although petitioner continues to suffer from mental illness, he has not presented clear
02 and convincing evidence that suggests he was too incompetent to file a timely § 2254
03 petition. An October 4, 1996, letter from petitioner's treatment providers noted that he had
04 regained competency in February 1990. Dkt. No. 19, Ex. 20 at 1. It indicated that his
05 treatment had "remained fairly steady" and that medication was resulting in a reduction in his
06 delusional thinking. *Id.* at 1-3. Although there was some indication that petitioner's
07 condition deteriorated somewhat, there is no indication that he ever reached the point of
08 incompetency. *Id.* at 4-5. Similarly, a letter from petitioner's treatment providers dated April
09 24, 1997, reiterates that petitioner regained competency in February 1990, and that his
10 condition continued to "remain fairly stable." Dkt. No. 19, Ex. 21 at 1. Despite having
11 delusions and some set-backs, petitioner was involved in a therapeutic group, accepted
12 leadership roles in his facility, and continued medication. *Id.* at 1-3. These letters reflect the
13 general tenor of other treatment notes in the record as well. Thus, it appears that, although
14 plaintiff suffered from mental illness, he was competent to file a § 2254 petition during the
15 period in question. Equitable tolling provisions therefore do not apply and the petition should
16 be dismissed as untimely.

17 IV. CONCLUSION

18 For the reasons discussed above, the Court recommends dismissing this § 2254
19 petition because it is barred by the statute of limitations. A proposed order accompanies this
20 Report and Recommendation.

21 DATED this 12th day of January, 2006.

22
23 
24 JAMES P. DONOHUE
25 United States Magistrate Judge
26